Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

71-978

JAMES MICHAEL McCONNELL,

Petitioner,

—v.—

ELMER L. ANDERSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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JAMES MICHAEL MCCONNELL,

Petitioner,

—v.—

ELMER L. ANDERSON, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered on October 18, 1971, reversing a decision of the United States District Court for the District of Minnesota which had granted petitioner injunctive relief and damages.

Opinions Below

The opinion of the United States Court of Appeals is as yet unreported and is set forth in the Appendix, *infra*, at p. 1a. The opinion of the United States District Court is reported at 316 F. Supp. 809, and is set out in the Appendix, *infra*, at p. 12a.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on October 18, 1971. An order denying rehearing was entered on November 18, 1971. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

Questions Presented

1. Whether the decision of a state university refusing to employ an applicant solely because of his status as a homosexual violates the due process and equal protection clauses of the Fourteenth Amendment?

2. Whether the decision of a state university refusing to employ an applicant because he publicly expressed his views on homosexuality, violates the First Amendment?

3. Whether the decision of a state university refusing to employ an applicant solely because of his status as a homosexual violates the right of privacy under the Fourth and Ninth Amendments?

4. Whether such a decision constitutes an unconstitutional bill of attainder?

Statement of the Case

Petitioner, 28 years of age, is a librarian holding a Master's degree. He was last employed during the 1969-70 school year at the Park College Library in Missouri. In late December of 1969 he sent a number of letters of inquiry to prospective employers and received a favorable response from the librarian at the University of Minnesota. By letter dated April 27, 1970, petitioner was advised that his appointment to the position of head of the cataloging division of the St. Paul Campus Library was confirmed as of July, 1970. Despite the language of this letter, no contract of employment was ever perfected, since the necessary formal approval by the Board of Regents was never forthcoming (App., *infra*, p. 13a).

Petitioner moved to Minneapolis on May 18, 1970. He publicly applied to the appropriate authority for a marriage license, seeking marriage to another man, one Jack Baker, a University of Minnesota law student. The incident drew considerable publicity but no reference was made to petitioner's connection with the University (App., *infra*, p. 14a). At the trial on his employment claim, petitioner denied that he was responsible for the publicity. While petitioner publicly professes his homosexuality, he has never advocated the practice of criminal homosexual acts to others, nor has he committed criminal acts of sodomy within the State of Minnesota (App., *infra*, p. 15a).

Petitioner's appointment was scheduled to come routinely before the University Board of Regents for consideration at its July, 1970 meeting. Prior thereto, a committee of the Regents was established to review peti-

tioner's appointment. It met twice, according petitioner and his lawyers a hearing. It pronounced the following resolution which the Board of Regents adopted:

> "That the appointment of Mr. J. M. McConnell to the position of the Head of the Cataloging Division of the St. Paul Campus Library at the rank of Instructor not be approved on the grounds that his personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University" (App., *infra*, p. 14a).

Petitioner's competency as a librarian was not challenged by the Board or its committee. The Board's action marked the first occasion in ten years where a rejection had occurred against favorable recommendation of the staff (App., *infra*, p. 15a).

After hearing evidence, the United States District Court for the District of Minnesota found for petitioner, and on August 4, 1970, enjoined respondents from refusing to employ petitioner solely because he is a homosexual, on the ground that such refusal is a denial of due process and equal protection of the laws under the Fourteenth Amendment. The Court noted that, in view of its due process holding, it found it unnecessary to reach the First Amendment questions raised, although the questions had merit (App., *infra*, p. 23a).

On appeal, the Court of Appeals for the Eighth Circuit reversed, holding *inter alia* that the courts must defer to respondent's administrative judgment in the absence of a clear and affirmative showing that the decision was arbitrary and capricious, that such proof was absent, and therefore

there was no denial of due process, nor a violation of petitioner's First Amendment rights, and that petitioner through his public advocacy of equality for homosexuals was trying to foist tacit approval of his sexual proclivities on his employer, the University (App., *infra*, p. 7a). It is to review the decision of the Court of Appeals for the Eighth Circuit that a writ of certiorari is now sought.

1.

The decision of the Court of Appeals for the Eighth Circuit creates a conflict among the circuits concerning constitutional limitations on government decisions not to employ homosexuals.

The decision below is in direct conflict with decisions of the Court of Appeals for the District of Columbia. The District of Columbia court has explicitly rejected the rule that the federal courts must defer to administrative decisions or limit review to procedural questions when a homosexual claims that he was discharged or not hired by a government agency because of his homosexual status. See *Adams* v. *Laird*, 420 F.2d 230 (1969), *cert. denied*, 397 U.S. 1039 (1970); *Norton* v. *Macy*, 417 F.2d 1161 (1969); *Scott* v. *Macy*, 402 F.2d 644 (1968); *Ulrich* v. *Laird*, 40 L.W. 2165 (D.C. Dist. Col. 1971). The employment decision may not turn on the status of homosexuality itself. For, as the court pointed out in the *Norton* case:

> "A reviewing court must at least be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service." 417 F.2d at 1167.

The Court of Appeals for the Eighth Circuit, on the other hand, stated in this case that the courts must defer to administrative decision. It refused to look behind the Regents' action to determine whether there is some reasonable connection between petitioner's homosexuality—or his advocacy of equality for homosexuals—and his potential job performance (App., *infra*, p. 6a). Indeed, the Regents produced no evidence even tending to establish that their decision was reached on the basis of a finding of some reasonable, specific and deleterious connection between petitioner's employment and the legitimate interests of the University. The district court found that there was no such connection (App., *infra*, p. 21a).

Since this case draws into conflict the decisions of two Courts of Appeals in an area of developing importance, the Writ should be granted.

2.

The case involves important questions of federal constitutional law which have not been but ought to be decided by this Court.

Under the decision below, a significant number of Americans may be barred from public employment simply because of their status as homosexuals. The effect of the decision is that homosexuals, whether they practice homosexual acts or not, are stigmatized as a class and made to suffer loss of employment, income and status. In addition the decision punishes those who merely express their homosexual preferences publicly.

It has been established that homosexuality is widespread in our society (as well as all other societies). Reliable studies have indicated that a significant percentage of the total adult population of the United States have engaged in overt homosexual practices. A. KINSEY, SEXUAL BEHAVIOR IN THE HUMAN MALE (1948); Finger, *Sex Beliefs and Practices among Male College Students*, 42 J. ABNORMAL AND SOCIAL PSYCH. 57 (1947).

The issues presented here are particularly timely for review. Attitudes are changing toward homosexuality, and the subject is increasingly a matter of public discussion. Furthermore, recent legal studies have concluded that restrictions on homosexual employment should be eliminated or at least modified. E.g., Note, *Government-Created Employment Disabilities of the Homosexual*, 82 HARV. L. REV. 1738 (1969); compare Project, *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County*, 13

U.C.L.A. Rev. 643 (1966). The time is ripe for examination by this Court of the constitutional issues presented in this case.

3.

Respondents' refusal to hire petitioner because of his status as a homosexual violates the due process and equal protection clauses of the Fourteenth Amendment.

Petitioner professed his homosexuality, denied any criminal acts, and symbolically publicized his homosexuality through his proposed marriage ceremony. The Board of Regents rejected him for employment despite the favorable recommendation of its staff. Thus petitioner was denied employment, first because of his homosexuality, and second by reason of his symbolic public act.[1]

Denial of government employment solely because of one's status as a homosexual is precisely the kind of arbitrary and invidiously discriminatory conduct that is prohibited by the Fourteenth Amendment equal protection and due process clauses. Unless the denial of employment can be shown to further some legitimate government interest, the

[1] The resolution of the Board of Regents refused to employ petitioner "on the grounds that his personal conduct, as represented in the public and university news media, is not consistent with the best interests of the University." His "personal conduct" may refer either to his homosexuality, or to the circumstances that he made this fact "public." Point 3 of this Petition for Writ of Certiorari deals with the first interpretation, i.e., his denial of employment on the grounds of his homosexuality, raising equal protection and due process questions under the Fourteenth Amendment. Point 4 deals with the second interpretation, i.e., his public expression on the subject, and thus necessarily raises the First Amendment issue as to his right to publicly profess his homosexual beliefs.

property interest in employment of the persons who occupy the disfavored status is arbitrarily denied without due process of law, and the class of persons occupying the disfavored status are subject to invidious discrimination.[2] In other words, government may not single out the status of homosexuality for this kind of disability, to deny an applicant employment it must demonstrate that employment of the particular homosexual will be inconsistent with the proper functioning of the particular job.

The Court of Appeals for the District of Columbia has held that the Civil Service Commission cannot refuse to certify a person as eligible for employment because of "immoral conduct," merely on the ground that the applicant publicly admitted his homosexuality and where there was no evidence he had engaged in homosexual acts. *Scott* v. *Macy*, 349 F.2d 182 (D.C. Cir. 1965); *Scott* v. *Macy*, 402 F.2d 644 (D.C. Cir. 1968).

In order to negate the fact that denial of employment to homosexuals constitutes invidious class discrimination, a clear showing must be made by the public agency denying employment that there is a specific connection between the fact of homosexuality and efficiency in job performance. The fact that the public agency would be embarrassed by an employment relationship clearly is not a sufficient defense; otherwise, any type of invidious class discrimina-

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[2] Although petitioner is an applicant for public employment, he is constitutionally protected against arbitrary discrimination because "the Constitution does not distinguish between applicants and employees; both are entitled, like other people, to equal protection against arbitrary or discriminatory treatment by the Government." *Scott* v. *Macy*, 349 F.2d 182 (D.C. Cir. 1965). See, e.g., *Torcaso* v. *Watkins*, 367 U.S. 488 (1961); *Shelton* v. *Tucker*, 364 U.S. 479 (1960); *In re Summers*, 325 U.S. 561 (1945); *United Public Workers of America* v. *Mitchell*, 330 U.S. 75 (1946).

tion (such as race or sex discrimination) could be justified. The Court of Appeals for the District of Columbia Circuit observed in *Norton* v. *Macy*, 417 F.2d 1161 (D.C. Cir. 1969):

> "A claim of possible embarrassment might, of course, be a vague way of referring to some specific potential interference with an agency's performance; but it might also be a smoke screen hiding personal antipathies or moral judgments which are excluded by statute as grounds for dismissal. A reviewing court must at least be able to discern some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service. Once the connection is established, then it is for the agency and the Commission to decide whether it outweighs the loss to the service of a particular competent employee." 417 F.2d 1161, 1167.

See *Adams* v. *Laird*, 420 F.2d 230 (D.C. Cir. 1969), *cert. denied*, 397 U.S. 1039 (1970); *Ulrich* v. *Laird*, —— F. Supp. ——, 40 L.W. 2165 (D. Colo. 1971); cf. *Johnson* v. *Branch*, 364 F.2d 177 (4th Cir. 1966), *cert. denied*, 385 U.S. 1003 (1967).

These principles of due process and equal protection deserve consideration and articulation by this Court, particularly in view of the contrary holding by the Court of Appeals for the Eighth Circuit in the instant case.

4.

Rejection of petitioner's appointment because of his publicly expressed views on homosexuality is a denial of freedom of speech as guaranteed by the First Amendment.

The Court of Appeals treated the present case as one "in which the prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the right to pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals. . . ." (App., *infra*, p. 7a).

First. The particular activities shown by "the allegations of the complaint and by the marriage license incident as well" indicate nothing more than petitioner's participation in a vigorous program of advocacy designed to obtain for homosexuals the same rights that are presently enjoyed by heterosexuals. Prior to the Regents' denial of his application for employment, he and another male, in order "to publicize his earnest belief that homosexuality should be accorded the same status and privileges in society as the heterosexual," applied to the Hennepin County Clerk for a license to marry. The Clerk's refusal to issue a license was followed by petitioner's application to the state courts for a writ of mandamus to compel issuance of the license. Finally, petitioner is a member of an organization which, as he understands its aim, advocates that homosexuals should have the same rights as heterosexuals.

(1) These activities taken separately or together, add up to nothing more than a lawful, peaceful attempt to use

existing political and judicial processes for what petitioner believes to be desirable social change. Even if this advocacy were of illegal conduct, it would be protected. E.g., *Kingsley Int'l Picture Corp.* v. *Regents*, 360 U.S. 684 (1959); *Brandenberg* v. *Ohio*, 395 U.S. 44 (1969). Petitioner has engaged in no illegal acts, nor has he urged others to commit such acts.[3] (2) The organizational aspects of petitioner's activities fall squarely within the First Amendment's guarantee of freedom to engage in peaceful association for the advancement of beliefs and ideas. E.g., *NAACP* v. *Alabama*, 357 U.S. 449 (1958); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). (3) Petitioner's application for a marriage license—a necessary prerequisite to subsequent litigation[4]—was an appropriate invocation of peaceful state process in an attempt to further petitioner's stated goal of obtaining for homosexuals the same rights enjoyed by heterosexuals presently. Such activity, of course, is protected by the First Amendment. *NAACP* v. *Button*, 371 U.S. 415, 429 (1963).

The State is without constitutional power to deny petitioner employment solely on the basis of the activities demonstrated by the record. *United States* v. *Robel*, 389 U.S. 258 (1967); *Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967); *Shelton* v. *Tucker*, 364 U.S. 479 (1960). And judged by this record, the State has demonstrated the obvious truth of the lament expressed recently by an anonymous homosexual playwright. He defended his use of a

[3] Defense counsel at trial devoted considerable effort to exploring the question of petitioner's possible criminal activities. Petitioner, however, testified without contradiction that he has never violated the Minnesota sodomy statute.

[4] See, *Baker* v. *Nelson*, 191 N.W. 2d 188 (1971).

false name in connection with his play, "Nightride," which presented a sensitive and sympathetic view of "a prominent playwright whose life had been spent concealing his homosexuality from the public," by declaring that:

> [O]nly the rich, the self-employed or the social outcast has nothing to fear from being labeled a homosexual. Freedom, even in 1972, is something one must be able to afford. No one who has a regular desk job in industry—as I do—can be startled by my action. They know instant dismissal, as well as investigation of their friends, would follow as a matter of course.
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> * * * * * * *
>
> . . . My real name is indeed worth my job. "Lee Barton," *Why Do Homosexual Playwrights Hide Their Homosexuality?* N. Y. Times, Sunday, Jan. 23, 1972, §2, p. 1, col. 1.

Second. The Eighth Circuit in its opinion characterized petitioner as one who "demands . . . to foist tacit approval of [his] socially repugnant concept on his employer" (App. *infra*, p. 7a). The plain fact, however, is that petitioner has nowhere and at no time either attempted to do so or indicated he would attempt to do so in the future. There is no indication, for example, that petitioner if employed would seek to misuse his position in the catalogue department to harangue his fellow-employees or further his social and political views. There is certainly nothing in the nature of a position as a librarian that would lead the general public to believe that such a position gave one special competence to speak out on the social status to be afforded homosexuals. Compare *Pickering* v. *Board of*

Education, 391 U.S. 563 (1968). Employment by government or by a public university does not imply endorsement of an individual's political or social views: the very diversity of such views represented among government employees and in a university community would make such endorsement impossible. Besides, this Court has made it amply clear that public employment may not be denied to a person because of his political views, even when they are strongly stated. See, e.g., *Pickering* v. *Board of Education, supra;* cf. *Rond* v. *Floyd*, 385 U.S. 116 (1966).

The State, which conceded petitioner's qualifications as a librarian, has sought to deny him employment solely upon the basis of his constitutionally protected activity. The Writ should be granted to consider the First Amendment implications of the Court of Appeals decision.

5.

Rejection of petitioner's appointment denied him the right to be free from unwarranted invasions of privacy protected by the Fourth and Ninth Amendments.

The right of privacy is protected by the Fourth Amendment. See *Mapp* v. *Ohio*, 367 U.S. 643 (1961). The right of privacy in matters of marriage, family and sex are protected against government invasions by the Ninth Amendment. *Griswold* v. *Connecticut*, 381 U.S. 479 (1965). See *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Skinner* v. *Oklahoma*, 316 U.S. 535 (1942); *Boddie* v. *Connecticut*, 401 U.S. 371 (1971).

The sexual behavior of individuals, including unmarried ones, has been protected by the right of privacy guaran-

teed by the Ninth Amendment. In a recent case, *Mindel v. U.S. Civil Service Commission*, 312 F. Supp. 485 (1970), on Ninth Amendment grounds, the District Court prohibited termination of employment of a government postal clerk because of his private sex life.

The Board of Regents here refused to hire petitioner solely because of what is surmised to be his private sex life and because of his stated views on private sexual preferences. The Board of Regents has thereby invaded petitioner's privacy. The invasion here was in the form of the government punishing petitioner for sexual preferences. The Court of Appeals in sustaining the Board's decision has encouraged such unwarranted invasions of privacy by justifying governmental perusal of employee's sexual proclivities as a hiring practice.

6.

Respondent's action in rejecting petitioner's appointment is in the nature of an unconstitutional bill of attainder prohibited by Article I, Section 10 of the U. S. Constitution.

The action of the Regents in rejecting petitioner's appointment of the petitioner, by name, for the professed reason that his personal conduct, as represented in the public and University news media, as not consistent with the best interest of the University, is a classical bill of attainder, Art. I, 10 of the U. S. Constitution.

This Court noted three chief characteristics of a bill of attainder in the classic case of *Cummings v. Missouri*, 4 Wall. (71 U.S.) 277 (1867). The Court said it applied to named individuals, or an easily ascertainable class; it

includes a legislative finding of guilt: and it contains a legislative enacted punishment. (Accord, *United States* v. *O'Brien*, 391 U.S. 367, 383 n. 30 (1968).) The Court said:

> In these cases [bill of attainder] the legislative body . . . pronounces upon the guilt of the party, without any of the forms or safeguards of a trial: . . . and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense. 4 Wall. (71 U.S.) at 323.

The *Cummings* Court noted that "the bills are generally directed against individuals by name, but they may be directed against a whole class." 4 Wall. (71 U.S.) at 323. The deprivation of any rights, civil or political, previously enjoyed, may be punishment, and disqualification from office may be such a punishment. 4 Wall. (71 U.S.) at 320. See also *Ex parte Garland*, 4 Wall. (71 U.S.) 333 (1867); *Lovett* v. *U. S.*, 328 U.S. 303 (1946); *Fleming* v. *Nester*, 363 U.S. 603 (1960); *Communist Party U.S.A.* v. *Subversive Activities Control Board*, 367 U.S. 1 (1961).

The Regents, by legislative fiat, have outlawed homosexuals who publicly profess their homosexuality from employment. The Regents have made a legislative finding of guilt by their resolution, and by their maintaining throughout that there is an inference that a homosexual who publicly professes his beliefs has and will engage in "criminal" sexual conduct. The Regents have inflicted a punishment by disqualifying petitioner and the class which they have defined as homosexuals who profess their homosexuality, from employment.

The Regents' action cannot escape condemnation as a bill of attainder just because its origin may not be in an

act of a traditional legislature. The prohibition is not to be so technically bounded. As this Court has ruled:

> While history thus provides some guidelines, the wide variation in form, purpose and effect of ante-Constitution bills of attainder indicates that the proper scope of the Bill of Attainder Clause, and its relevance to contemporary problems, must ultimately be sought by attempting to discern the reasons for its inclusion in the Constitution, and the evils it was designed to eliminate. "The best available evidence, the writings of the architects of our constitutional system, indicates that the Bill of Attainder Clause was intended not as a narrow, technical (and therefore soon to be outmoded) prohibition, but rather as an implementation of the separation of powers, a general safeguard against legislative exercise of the judicial function or more simply—trial by legislature. *United States* v. *Brown*, 381 U.S. 437, 442 (1965); cf. also, *Joint Anti Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 144 (1951) (Black J. dissenting).

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Eighth Circuit

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 20,583

JAMES MICHAEL McCONNELL,

Appellee,

vs.

ELMER ANDERSON, *et al.*,

Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

October 18, 1971.

Before MEHAFFY, ROSS and STEPHENSON, *Circuit Judges.*

STEPHENSON, *Circuit Judge.*

This case has its origin in a July 9, 1970 resolution of the University of Minnesota Board of Regents not to approve the application of James Michael McConnell to head, at the rank of Instructor, the cataloging division of the University's St. Paul campus library on the ground that his "personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University." McConnell's complaint alleged

that he was offered the division head appointment in April 1970; that he accepted the offer in May 1970, but that the offer was withdrawn,[1] pursuant to the foregoing resolution, after he and another male publicly applied for a marriage license at the Hennepin County, Minnesota Clerk's office.

On July 22, 1970, McConnell brought suit for injunctive relief in the United States District Court for the District of Minnesota, naming as defendants the individual members of the Board of Regents and Ralph H. Hopp, the University Librarian. In addition to the allegations above, his complaint asserted that he was a homosexual and that the Board's resolution not to approve his employment application was premised on the fact of his homosexuality and upon his desire, as exemplified by the marriage license incident, specifically to publicly profess his "earnest" belief that homosexuals are entitled to privileges equal to those afforded heterosexuals. In further detail he alleged that the Board, acting under color of the statutes, regulations, customs and usages of the State of Minnesota, subjected him to arbitrary, unreasonable and discriminatory action working a deprivation of his Fourteenth Amendment rights to equal protection of the laws and due process of law. Federal jurisdiction was claimed, *inter alia*, under 42 U.S.C.A. § 1983 and 28 U.S.C.A. § 1343(3).[2] Judge Neville, after conducting an oral hearing at which evi-

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[1] McConnell acknowledges that no contract of employment was ever finalized since the Board of Regents refused to approve his application.

[2] McConnell also asserted federal court jurisdiction under 28 U.S.C.A. § 1331 and 42 U.S.C.A. § 1985 and 28 U.S.C.A. § 1343(4). We are satisfied that federal jurisdiction properly was invoked under § 1983 and § 1343(3).

dence was taken, entered judgment for McConnell and enjoined the Board from refusing to employ him "solely because, and on the grounds that he is a homosexual and that thereby 'his personal conduct, as presented in the public and University news media, is not consistent with the best interest of the University.'" 316 F. Supp. 809 (D. Minn. 1970). Judge Neville stayed the judgment and suspended the injunction pending disposition of this appeal. We must reverse.[3]

Much of the factual background is set forth in Judge Neville's published memorandum opinion and need not be repeated at any length here. It suffices merely to stress, by way of summary, that McConnell apparently is well-educated and otherwise able, possessing both an academic degree and a master's degree; that he formerly was employed as Acquisitions Librarian at Park College in Missouri; that he is a member of the organization known as FREE (Fight Repression of Erotic Expression); that on May 18, 1970, McConnell and a friend referred to in the record as "Jack Baker" encountered Dr. Hopp and informed him of their intention to obtain a license to marry; that during this conversation Dr. Hopp expressed concern that such an occurrence might well jeopardize favorable consideration of McConnell's employment application; that about three hours later on the same day, McConnell and

[3] The facts are essentially undisputed, and the issue is whether, as a matter of law, the Board's action transcends constitutional limits. We therefore are not confined by the "clearly erroneous" standard of Fed. Rules Civ. Proc. Rule 52(a), 28 U.S.C.A. *United States* v. *General Motors Corp.*, 384 U.S. 127, 141-142, n. 16 (1966). See also *Sun Insurance Office* v. *Bs-Mac Transport Co.*, 132 F.2d 535, 536 (CA 8 1942) and *Glassman Construction Company* v. *United States*, 421 F.2d 212, 214 (CA 4 1970), and cases there cited.

Jack Baker appeared at the Hennepin County Clerk's office and made formal application for the license; that this event received the attention of the local news and television media;[1] that the Board's Faculty, Staff and Student Affairs Committee, on June 24, 1970, convened to initially consider the matter of McConnell's proposed appointment and voted that it be not approved; that McConnell promptly was so advised and given notice that he could request a hearing at the Committee's next scheduled meeting on July 9; that McConnell requested a hearing; that he and his counsel appeared at the meeting and were furnished copies of the resolution in its proposed form; that McConnell and his counsel took advantage of this opportunity to present information they deemed supportive of his application, and that at the conclusion of the presentation on McConnell's behalf, the Committee adopted the resolution. It perhaps is well at this point to note that McConnell makes no claim that the Board denied him procedural due process.

The Board's primary demand for reversal is based upon a most fundamental contention. It is the Board's claim that Judge Neville, in issuing the injunction, exceeded his proper function and authority by superimposing his own situational judgment upon legitimate Board action supported by substantial and material factual data. The Board also mounts a due process attack against the timeli-

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[1] From the Appendix it is revealed that this antic generated at least four news articles in the local press: Bergerson, *Prospective Newlyweds Really in a Gay Mood*, St. Paul Pioneer Press, May 19, 1970; *Homosexual Marriage License Denial Urged*, The Minneapolis Star, May 23, 1970; *'Gay' Marriage Refusal Fought*, St. Paul Pioneer Press, May 27, 1970, and Coleman, *Two Homosexuals Plan to Wed*, Minnesota Daily, May 19, 1970. McConnell specifically denied arranging for the presence of the press at this event.

ness and sufficiency of service of process. It urges, too, that Judge Neville improperly prevented it from cross-examining McConnell at the oral hearing with reference to the nature of his past conduct.

We focus our initial attention upon our standard of review on the Board's action. The Minnesota Supreme Court has had no less than five occasions to determine and review the proper role and function of the Board of Regents in the management, control and administration of the University of Minnesota.[5] From these decisions we think it can be said generally that, insofar as Minnesota's highest court is concerned, the Board is vested with plenary and exclusive authority to govern, control and oversee the administration of the University and that the role of Minnesota courts in reviewing Board Action is limited to determining whether the Board has kept within the scope of its constitutional powers. We think this is but another manner of saying that, at least with respect to matters purely administrative in nature, viz., the employment of University personnel and the like, the discretion of the Board necessarily is broad and subject only to such judicial review as normally is available to litigants allegedly aggrieved by administrative action generally. We think the attitude and approach to the Board's role by Minnesota's court is sound and instructive and we adopt it as our own.

Without question, then, the Board is on relevant and sound ground in asserting that the decision embodied in its resolution cannot be overturned in the absence of a

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[5] *Bailey* v. *University of Minnesota*, 187 N.W.2d 702, 704 (1971); *State ex rel. Sholes* v. *University of Minnesota*, 54 N.W.2d 122, 126 (1952); *Fanning* v. *University of Minnesota*, 236 N.W. 217, 218-219 (1931); *State* v. *Chase*, 220 N.W. 951, 952-953 (1923), and *Gleason* v. *University of Minnesota*, 116 N.W. 650, 651-652 (1908).

clear and affirmative showing that it was premised upon arbitrary or capricious conduct. That a court is, in reviewing a determination of an administrative body, limited to deciding whether the administrative action was arbitrary, unreasonable or capricious long has been settled.* This particularly must be so, it seems to us, where, as here, the determination under challenge is one falling within the considerable discretion entrusted those charged with the heavy responsibility of supervising the administration of this nation's colleges and universities.

It is McConnell's position that the Board's decision not to approve his employment application reflects "a clear example of the unreasoning prejudice and revulsion some people feel when confronted by a homosexual." That being so, he argues that the Board's action was arbitrary and capricious and thus violative of his constitutional rights. We do not agree.

It is our conclusion that the Board possessed ample specific factual information on the basis of which it reasonably could conclude that the appointment would not be consistent with the best interests of the University. We need only to observe that the Board was given the unenviable task and duty of passing upon and judging McConnell's application against the background of his actual conduct. So postured, it is at once apparent that this is not a case involving mere homosexual propensities on the part of a prospective employee. Neither is it a case in which an applicant is excluded from employment because

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* See generally *Grace Line, Inc.* v. *Federal Maritime Board*, 263 F.2d 709, 711 (CA 2 1959), and cases there cited, and, *semble*, *Konigsberg* v. *State Bar*, 353 U.S. 252, 262 (1957). See also *Clarke* v. *Redeker*, 259 F. Supp. 117, 124 (Three-judge court, SD Iowa, 1966).

of a desire clandestinely to pursue homosexual conduct. It is, instead, a case in which something more than remunerative employment is sought; a case in which the applicant seeks employment on his own terms; a case in which the prospective employee demands, as shown both by the allegations of the complaint and by the marriage license incident as well, the right to pursue an activist role in *implementing* his unconventional ideas concerning the societal status to be accorded homosexuals and, thereby, to foist tacit approval of this socially repugnant concept upon his employer, who is, in this instance, an institution of higher learning. We know of no constitutional fiat or binding principle of decisional law which requires an employer to accede to such extravagant demands. We are therefore unable fairly to categorize the Board's action here as arbitrary, unreasonable or capricious.

We turn briefly to the Board's claim that timely service of process had not been effected on its individual members at the time of the District Court hearing on the motion for preliminary injunctive relief. We regard this contention as legally frivolous. The challenge was first raised during

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Compare *Pickering* v. *Board of Education*, 391 U.S. 563, 568, 573 (1968). In the District Court McConnell apparently argued that he has the right to apply for a marriage license and that such is "symbolic speech" within the protection of the Free Speech and Due Process clauses of the First and Fourteenth Amendments. See *McConnell* v. *Anderson*, p. 815 of 316 F.Supp. He relies largely on *Tinker* v. *Des Moines Ind. School Dist.*, 393 U.S. [illegible] case from this circuit. Although this contention is not pressed here, we feel constrained to observe that we do not believe that *Tinker*, when read in light of its distinctive facts, can afford McConnell any comfort in this regard.

Cf. *Pickering* v. *Board of Education*, *supra*, pp. 574-575 of 391 U.S.; *Sweezy* v. *Board of Higher Education*, 350 U.S. 551, 557-559 (1956), and *Wieman* v. *Updegraff*, 344 U.S. 183, 190-192 (1952).

the hearing but pursued no further. In this posture, we feel that we would be justified in holding that the claim was waived. In any event, the crucial question in this regard is whether, on the facts present here, the Board received notice sufficient to afford it the opportunity to appear and to be heard.[2] We hold that it received such notice.

Finally, without citing us to any decisional authority, the Board complains that Judge Neville improperly limited its right to cross-examine McConnell relative to his past conduct. We deem it unnecessary to consider this claim in light of our disposition of the Board's principal contention.

Reversed, with directions to dissolve the injunction and to dismiss the action on the merits.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

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[2] See generally, *Milliken v. Meyer*, 311 U.S. 457, 463 (1940).

Order of the Court of Appeals Denying Rehearing

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1971

No. 20583

JAMES MICHAEL McCONNELL,

Appellee,

vs.

ELMER R. ANDERSON, *et al.*,

Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

The Court having considered petition for rehearing en banc filed by counsel for appellee and, being fully advised in the premises, it is now here ordered that the petition for rehearing en banc be, and is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is now here ordered that the petition for rehearing also be, and is hereby, denied.

It is further ordered that the issuance of the mandate herein be, and the same is hereby, stayed for a period of thirty days from and after this date, and if within said period of thirty days there is filed with the Clerk of this Court a certificate of the Clerk of the Supreme Court of the United States that a petition for a writ of certiorari and record have been filed, the stay hereby granted shall continue until the final disposition of the case by the Supreme Court.

Order of the District Court Granting the Injunction

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

4-70 Civ 207

JAMES MICHAEL McCONNELL,

Plaintiff,

v.

ELMER R. ANDERSON; LYMAN A. BRINK; FRED A. CINA; DANIEL C. GAINEY; ALBERT V. HARTL; MARJORIE J. HOWARD; HERBERT L. HUFFINGTON, M.D.; FRED J. HUGHES; LESTER A. MALKERSON; GEORGE W. RAUENHORST; NEIL C. SHERBURNE; JOHN A. YNGVE; and RALPH H. HOPP,

Defendants.

The above case came before the court at Minneapolis, Minnesota on August 5, 1970 on the motion of plaintiff for a preliminary injunction. Witnesses were sworn and exhibits were received in evidence. Thereafter counsel stipulated, in accordance with Rule 65(a)(2) of the Federal Rules of Civil Procedure, that the case should be deemed to have been tried and submitted for decision on the merits and thus consolidated with the motion for preliminary injunction.

John R. Goetz and Stephen M. Goldfarb, Esqs., Minneapolis, Minnesota, appeared for the plaintiff; Moore, Cos-

tello and Hart, St. Paul, Minnesota, by A. Patrick Leighton and Richard A. Moore, Esqs., together with R. Joel Tierney, Esq., Minneapolis, Minnesota, appeared for defendants.

The court heard the evidence adduced at the trial and on the basis thereof, the briefs submitted by counsel, and on all of the files, records and proceedings herein and for the reasons set forth in the accompanying memorandum opinion,

IT IS ORDERED That defendants and each of them individually and jointly in their official capacity and acting as members of the Board of Regents of the University of Minnesota, be and they hereby are permanently restrained and enjoined from failing and refusing or from directing or permitting those under their direction, control and jurisdiction to refuse to employ plaintiff solely because and on the grounds that he is an homosexual and that thereby "his personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

Let judgment be entered accordingly.

Dated: September 8, 1970.

PHILIP NEVILLE
United States District Judge

Memorandum Opinion of the District Court

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

FOURTH DIVISION

No. 4-70 Civ. 297

JAMES MICHAEL McCONNELL,

Plaintiff,

v.

ELMER R. ANDERSON, LYMAN A. BRINK, FRED A. CINA, DANIEL C. GAINEY, ALBERT V. HARTL, MARJORIE J. HOWARD, HERBERT L. HUFFINGTON, M.D., FRED J. HUGHES, LESTER A. MALKERSON, GEORGE W. RAUENHORST, NEIL C. SHERBURNE, JOHN A. YNGVE, and RALPH H. HOPP,

Defendants.

NEVILLE, *District Judge.*

Squarely presented to the court for decision is a case where the University of the State of Minnesota, acting through its Board of Regents, rejected as an employee an otherwise qualified male applicant because of his public profession that he is an homosexual. The question raised is whether under the 1871 Civil Rights Act, 42 U.S.C. § 1983, the Board of Regents, acting "under color of any statute, ordinance, regulation, custom, or usage, of any State . . ." deprived plaintiff, as an homosexual and as a citizen of the United States "of any rights, privileges or

immunities secured by the Constitution and laws," specifically the due process, privileges and immunities, and equal protection clauses of the Fourteenth Amendment to the United States Constitution and collaterally the freedom of speech or "expression" clause of the First Amendment. The court has found no authority directly bearing on the question and none of the cases presented by either counsel are directly on point. The case at bar thus appears to be one of first impression.

The facts are largely undisputed. Plaintiff, 28 years of age, is a librarian holding a Master's degree. He was last employed during the 1969-70 school-year at the Park College Library in Missouri. In late December of 1969 he sent a number of letters of inquiry to prospective employers and received a favorable response from the librarian at the University of Minnesota. An interchange of correspondence and a personal interview followed, an employment application was submitted and by letter dated April 27, 1970 plaintiff was advised "This is to confirm the telephone conversation . . . in which we agreed to your appointment to the position of Head of the Cataloging Division in our St. Paul Campus Library . . . [carrying] an annual salary of $11,000 . . . to begin on or about July 1, 1970." Despite the language of this letter, it is acknowledged by plaintiff that no contract of employment was ever perfected, since the formal necessary approval by the Board of Regents was never forthcoming.

Plaintiff moved to Minneapolis and on or about May 18, 1970 publicly applied to the appropriate authority for a marriage license, seeking marriage to another man, one Jack Baker, a University of Minnesota law student. Both men freely admitted to the news media that they were and are homosexuals. This rather bizarre occurrence drew

substantial publicity, including pictures in the newspapers of the two men, though no reference was made to plaintiff's connection with or future employment by the University.

Plaintiff's appointment was scheduled to come routinely before the University Board of Regents for consideration at its July 1970 meeting. Prior thereto, a committee of the Regents was appointed which met twice, the latter time on July 9, 1970 at which meeting 11 of the 12 Regents were in attendance. The committee accorded plaintiff and his lawyers a personal interview and hearing. The following recommendation was thereinafter adopted unanimously:

> "That the appointment of Mr. J. M. McConnell to the position of the Head of the Cataloging Division of the St. Paul Campus Library at the rank of Instructor not be approved on the grounds that his personal conduct, as represented in the public and University news media, is not consistent with the best interest of the University."

Under the Board's rules no appearance is permitted by anyone at its meetings but the committee's recommendation was duly adopted by the Regents at its regular meeting the next day.

Plaintiff testified that he is presently receiving no earnings whatsoever; that he declined a tendered position elsewhere in reliance on his University of Minnesota employment, which position has now been filled; that he has approximately $200 total assets. He professes publicly his homosexuality. He is a member of an organization known as FREE, standing for "Fight Repression of Erotic Expression," though apparently its name recently has been

changed. This organization is comprised of homosexuals and maintains headquarters in the University of Minnesota Student Union. Plaintiff is in no way clandestine about his homosexuality. On cross-examination he denied that he had ever practiced or committed the crime of sodomy within the State of Minnesota, though he is presently living at the same address as his intended "spouse" Jack Baker. He stated unequivocally that he has never advocated the practice of homosexuality by anyone else nor induced any other person to engage in its pursuits.

The chairman of the Regents' aforesaid committee was a witness at the trial. Counsel for the University stated to the court that this is the first case in at least ten years where a rejection has occurred against the favorable recommendation of the academic staff. The Regents' position, with no dissenting vote, is that even though plaintiff may be a very capable librarian, his professed homosexuality connotes to the public generally that he practices acts of sodomy, a crime under Minnesota law; that the Regents have a right to presume that by his applying for a license to marry another man plaintiff intended, were the license to be granted, to engage in such sodomous criminal activities; that the Regents cannot condone the commission of criminal acts by its employees and thus plaintiff has rendered himself unfit to be employed.

Several observations are in order:

(1) Though originally the case came before the court on a motion for temporary restraining order and preliminary injunction, both counsel have stipulated the case may be treated on the present record as fully tried and submitted on the merits as provided in Rule 65(a)(2) of the Federal Rules of Civil Procedure. At the hearing the questions of

sovereign immunity and effective service of process on some of the defendants were raised, but since defendants make no mention nor point thereof in their brief, the court does not consider nor deem urged these questions.

(2) No claim is made by plaintiff that he actually has or had an enforceable employment contract and thus he claims no tenure rights of the type which under the University rules would require a showing of good cause before termination of employment.

(3) No claim is asserted under the 1964 Civil Rights Act, 42 U.S.C. § 2000e—2, which makes it an unlawful employment practice for any employer, private or public "to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex or natural origin." The term homosexual is significantly omitted from this statute and thus it is of no assistance to a decision of the case except generally to indicate to the court the adoption of a national policy by the Congress against discriminatory hiring and employment practices and for equal employment opportunities.

(4) No medical or other expert witnesses were called by either party to opine on the habits, proclivities, attitudes or attributes of an homosexual person. The court is therefore left with but the dictionary definition of the term.

(5) No attack was made on plaintiff's competency as a librarian, nor was there any attempt to show that his homosexual tendencies might affect the performance of his duties or his efficiency as a librarian.

(6) Nowhere in the rules and regulations adopted by the University is there any mention of homosexuals nor does

the application form in any way inquire into an applicant's sexual habits or practices, heterosexual or otherwise.

(7) Plaintiff will not be in a position to handle or be exposed to information involving national security or so called "classified" information important to the national interest.

In the absence of any controlling statute, the question remains as to whether it is a violation of plaintiff's constitutional rights to refuse him public employment because he proclaims that he is a homosexual.

No case in the United States Supreme Court has been found where a person was either discharged or the prospective employer refused to hire him on the grounds that he was an homosexual or that specific acts of homosexuality were committed. In the Circuit courts two cases have been found in the District of Columbia involving the same plaintiff. They hold that an admission that one is an homosexual, standing alone and without evidence of any practice thereof will not justify the Civil Service Commission in refusing to certify him as eligible for employment based on a determination of "immoral conduct". *Scott* v. *Macy*, 349 F.2d 182 (D.C. Cir. 1965); *Scott* v. *Macy*, 402 F.2d 644 (D.C. Cir. 1968). These cases come as close as any to a refusal to hire for homosexuality as distinguished from a discharge from existing employment. There appear to be no Circuit court cases where a government employee has been discharged for homosexuality *per se*. There are several cases where employees have been discharged for homosexual acts which are specified by the discharging agency and either clearly supported in the evidence before it, or simply not contested by the employee. Most of the cases reviewing such discharges for reasonableness have simply

deferred to the agency determination thereof. *Vigil* v. *Post Office Dept.*, 406 F.2d 924, 925 (10th Cir. 1969); *Schlegel* v. *United States*, 416 F.2d 1372, 1378 (Ct. Cl. 1969); *Youngmoon* v. *Macy*, 398 F.2d 317, 318 (5th Cir. 1968); *Taylor* v. *United States Civil Service Comm'n*, 374 F.2d 466, 470 (9th Cir. 1967). The District of Columbia Circuit, however, has indicated its willingness to look behind the agency's determination, *Doe* v. *Hampton*, 317 F.2d 582, 587-89 (D.C. Cir. 1973), and where a violation of constitutional due process is found, it has not hesitated to substitute its judgment for that of the agency. *Norton* v. *Macy*, 417 F.2d 1161, 1164 (D.C. Cir. 1969).

In *Norton* the court refused to affirm a discharge of an employee absent a further satisfactory showing of likelihood of effect on efficiency in employment. An article in 58 Geo. L.J. 632 (1970) comments on the *Norton* case and reviews the judicial decisions to date. See also *Morrison* v. *State Board of Education*, 461 P.2d 375 (Cal.2d 1969), where the court reversed a discharge for homosexuality, finding as to a teacher no reliable indication that such characteristic and a non criminal physical relationship would impair his teaching effectiveness. The court stated:

> "This lack of evidence is particularly significant because the board failed to show that petitioner's conduct in any manner affected his performance as a teacher. There was not the slightest suggestion that petitioner had ever attempted, sought, or even considered any form of physical or otherwise improper relationship with any student. There was no evidence that petitioner had failed to impress upon the minds of his pupils the principles of morality as required by section 13556.5 of the Education Code. There is no reason to believe that the Schoeringer incident affected

petitioner's apparently satisfactory relationship with his co-workers." 301 F.Supp. at 362

The courts have abandoned the concept that public employment and the opportunity therefor is a mere privilege and not a constitutionally protected right. As stated in this court's opinion in *Olson v. Regents of University of Minnesota*, 301 F. Supp. 1356 (D. Minn. 1969):

> "It was once held that a citizen has no constitutional right to be a policeman and that governmental employment was an unprotected privilege and not a right. See the opinion by Mr. Justice Holmes, as a member of the Massachusetts Supreme Judicial Court, in McAuliffe v. Mayor of New Bedford, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892). More recently, however, this right-privilege distinction as a limitation on substantive or procedural due process affecting employment in the public sector has been seriously eroded if not virtually rejected. See, e.g., Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216 (1952); Slochower v. Board of Higher Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); Greene v. McElroy, 360 U.S. 474, 79 S.Ct. 1400, 3 L.Ed. 2d 1377 (1959); Dixon v. Alabama State Board of Education, 294 F.2d 150 (5th Cir.), *cert. denied*, 368 U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961); and Kelly v. Wyman, 294 F.Supp. 893 (S.D.N.Y. 1968) (three-judge court); W. W. Van Alstyne, The Demise of the Right-Privilege Distinction in Constitutional Law, 81 Harv. L.Rev. 1439 (1968). The focus of inquiry has shifted from identification of individual rights to an examination of the reasonableness of governmental

action.' Note, Dismissal of Federal Employees—The Emerging Judicial Role, 66 Colum.L.Rev. 719, 734 (1966). Thus in Wieman v. Updegraff, *supra* 344 at 192, 73 S.Ct. at 219 the Supreme Court stated:

> 'We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.'" 301 F. Supp. at 1359

Particularly apropos here is the language of Chief Circuit Judge Bazelon in *Scott v. Macy*, 349 F.2d 182 (D.C. Cir. 1965):

> "Appellant is an applicant for public employment, and thus may have less statutory protection against exclusion than an employee. But he is not without constitutional protection. The Constitution does not distinguish between applicants and employees; both are entitled, like other people, to equal protection against arbitrary or discriminatory treatment by the Government. The Executive may have discretion in hiring or

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[*] See Torcaso v. Watkins, 367 U.S. 488, 81 S.Ct. 1680, 6 L.Ed.2d 982 (1961); Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 5 L.Ed.2d 231 (1960); In re Summers, 325 U.S. 561, 571, 65 S.Ct. 1307, 89 L.Ed. 1795 (1945); United Public Workers of America v. Mitchell, 330 U.S. 75, 100, 67 S.Ct. 556, 91 L.Ed. 754 (1947); Hunter v. McLaughlin, 102 U.S. App.D.C. 293, 252 F.2d 857 (1958); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); In Joint Anti-Fascist Refugee Committee v. McGrath, Mr. Justice Jackson, concurring, stated: "The fact that one may not have a legal right to get or keep a government post does not mean that he can be adjudged ineligible illegally. Perkins v. Elg [307 U.S. 325, 349, 59 S.Ct. 884, 83 L.Ed. 1320]." 341 U.S. 123, 185, 71 S.Ct. 624, 655; 95 L.Ed. 817 (1951)." 349 F.2d at 183-84

firing, but '[d]iscretionary power does not carry with it the right to its arbitrary exercise.' Shachtman v. Dulles, 96 U.S. App. D.C. 287, 290, 225 F.2d 938, 941 (1955).

Though by current standards many persons characterize an homosexual as engaging in "immoral conduct", "indecent" and "disgraceful", it seems clear that to justify dismissal from public employment, or as the court finds in this case to reject an applicant for public employment, it must be shown that there is an observable and reasonable relationship between efficiency in the job and homosexuality. In the case at bar, of course, since plaintiff never has been permitted to enter on his duties, there is no history as to his performance or the possible claimed affect of his homosexuality. The Regents are of necessity speculating and presuming Plaintiff's position will not expose him to children of tender years who conceivably could be influenced or persuaded to his penchant. What he does in his private life, as with other employees, should not be his employer's concern unless it can be shown to affect in some degree his efficiency in the performance of his duties. See *Norton supra* at p. 1165 where the court stated:

> "... But the notion that it could be an appropriate function of the federal bureaucracy to enforce the majority's conventional codes of conduct in the private lives of its employees is at war with elementary concepts of liberty, privacy, and diversity. ..." 417 F.2d at 1165

An homosexual is after all a human being, and a citizen of the United States despite the fact that he finds his sex gratification in what most consider to be an unconventional

manner. He is as much entitled to the protection and benefits of the laws and due process fair treatment as are others, at least as to public employment in the absence of proof and not mere surmise that he has committed or will commit criminal acts or that his employment efficiency is impaired by his homosexuality. Further, the decided cases draw a distinction between homosexuality, i.e., sexual propensity for persons of one's own sex and the commission of homosexual criminal acts. Homosexuality is said to be a broad term involving all types of deviant sexual conduct with one of the same sex, but not necessarily criminal acts of sodomy.

Plaintiff does not have an inalienable right to be employed by the University but he has a right not to be discriminated against under the Fourteenth Amendment due process clause. He has a constitutional right that the terms of his public employment which he must meet be "reasonable, lawful and non-discriminatory." *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956); *Keyishian v. Board of Regents of the University of New York*, 385 U.S. 589 (1967); *Wieman v. Updegraff*, 344 U.S. 183 (1952); *Schware v. Board of Bar Examiners of New Mexico*, 353 U.S. 232, 234, 239 (1957). A discriminatory deprivation of employment is a deprivation of liberty and property under the Fourteenth Amendment, *Greene v. McElroy*, 360 U.S. 474, 492 (1959); *Dent v. West Virginia*, 129 U.S. 114, 121-22 (1889).

The "purges" of the late 1940's and 1950's of homosexuals in the federal government service, particularly in the Department of State are not authority in the case at bar. There clandestine homosexuals, when discovered, were claimed to have become the subject of possible blackmail. See 82 HARV.L.REV. 1738 (1969). Here plaintiff is very

open about his deviation, and in any event is not dealing with classified or secret information important to the national security.

Plaintiff argues that he had a perfect right to apply for a marriage license and that such is "symbolic speech" within the doctrine of such cases as *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969), and *Saunders* v. *Virginia Polytechnic Institute*, 417 F.2d 1127 (4th Cir. 1969). This might well be a useful argument to plaintiff had he been arrested for some asserted law violation at the time of his attempt to secure a marriage license. Plaintiff argues that it was because of the publicity in the news media (mentioned by the Regents in its resolution) that was attendant upon his exercise of his right of free expression that the University was motivated to reject his employment and thus indirectly he is being denied his right of free expression under the First Amendment. Though there may be merit in such contention it is not necessary for the court to decide this nor any other alleged constitutional violation in view of the holding above relative to due process.

Since the case has been submitted for decision on the merits, the question of irreparable harm required for a preliminary injunction resolves itself into the question of whether there is an adequate remedy at law. Inasmuch as plaintiff has no contract of employment he has no action for damages thereunder. The hiring season, as the court understands for educational institutions occurs in spring and early summer and if plaintiff is denied employment now, in all probability he may not be able to secure employment in his field at least until next year. The court finds this is a case where no adequate remedy at law exists.

A separate order granting an injunction has been entered. This memorandum opinion will serve in lieu of findings of fact as provided by Rule 52(a) of the Federal Rules of Civil Procedure.